DEC 30 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 520

SIG ELLINGSON and COMPANY, a Corporation,
Petitioner,

vs.

E. C. BUTENBACH, d/b/a GARNER SALES COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, A. D. 1952.

No.

SIG ELLINGSON and COMPANY, a Corporation,
Petitioner,

vs.

E. C. BUTENBACH, d/b/a GARNER SALES COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Sig Ellingson and Company, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, filed and rendered on October 28, A. D. 1952, (R. 62),

which judgment became final by the overruling of Petitioner's petition for rehearing on the 17th day of November, 1952 (R. 73), by which the final judgment of the District Court of the United States for the District of Minnesota was affirmed (R. 62). Mandate has been stayed to give Petitioner an opportunity to apply to this Court for a Writ of Certiorari (R. 75).

STATUTES RELIED UPON TO SUSTAIN THIS COURT'S JURISDICTION AND PETITIONER'S RIGHT TO HAVE WRIT OF CERTIORARI GRANTED.

Petitioner relies upon the provisions of 28 U.S.C.A. Section 1254, and particularly sub-paragraph 1 thereof, to have a Writ of Certiorari granted and to sustain the jurisdiction of this Court.

OTHER FEDERAL STATUTES INVOLVED.

This case presents highly important federal questions not heretofore decided by this Court. These questions arise out of the provisions of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C.A. Sections 201-217, inclusive; these questions arising particularly from the construction, effect and enforcement given this Act by the decisions of this Court and other federal tribunals.

STATE LAW.

While this Petitioner contends that the case is governed by the federal law and in no way by the law of the State of Iowa or Minnesota, if the law of the State of Iowa is important, the lower Courts failed to follow the law of the State of Iowa, as announced in the last decision of the Supreme Court of the State of Iowa on the question involved.

SUMMARY AND SHORT STATEMENT OF THE CASE.

NATURE OF THE CASE.

Respondent sued Petitioner in conversion for the value of nineteen head of cattle, in the sum of $5,244.07, which cattle Petitioner received and sold, as a market agency, for the account of one Tobias Brackey, a speculator in cattle to whom Respondent had been selling cattle for many years, and to whom Respondent sold and delivered the cattle in question (R. 2 to 6, incl.).

SOME OF THE UNDISPUTED MATERIAL FACTS.

Tobias Brackey, Who Made the Sale in Question, and the Nature of the Business in Which He was Engaged.

Tobias Brackey, Respondent's vendee, at all times in question and for many years prior thereto, was engaged in buying live stock at Buffalo Center, Iowa and other sales barns and shipping such livestock to the centralized market at South St. Paul for the purpose of selling at a profit (12, 13 and 14).

Respondent and the Nature of His Business.

Respondent, during all the times in question and for seventeen years prior thereto, operated a sales barn and sold at public auction to the highest bidder many different owners' live stock. (R. 10).

Respondent's Business Transactions with Brackey.

Respondent testified that he had known Brackey for eight to ten years and that he was engaged in buying cattle for resale (R. 12). Respondent testified that during the last two years he made sales to Brackey forty or forty-five times a year or from eighty to ninety sales the two years. During the year 1950, from January 5th to April 20th, including the sale in question on the 20th, Petitioner made at least ten sales to Brackey (R. 20). Brackey paid Respond-

ent for all these purchases by check on the Lake Mills Bank. His checks had been honored and the only check on which payment was refused was the check for payment of the sale on April 20th (R. 13); this was the only check that was ever received from him which was not honored (R. 13).

On April 20, 1950, Respondent sold the nineteen head of cattle in question on ten different drafts of sales to Tobias Brackey for the sum of $5,244.07 (R. 11, 12 and 13, Defendants Exhibit 1, R. 17).

When Respondent delivered possession of the cattle to Brackey and accepted his check and delivered to him a copy of the account sales marked paid, he knew Brackey was buying for the purpose of resale and he delivered the live stock knowing that it was going immediately to St. Paul or some other centralized market for resale (R. 12, 13 and 14).

The Nature of Petitioner's Business and the Acts Committed by Petitioner.

Petitioner's business was that of a market agency, performing its functions, as required by the Packers and Stockyards Act, as a federal public utility. Without any knowledge of any fact as to why it should refuse its services or knowledge of any fact to place it upon inquiry, and as it had been doing for many years for the said Tobias Brackey, it received and sold for his account the cattle in question, on the 21st day of April, 1950, and on the same day accounted to the said Tobias Brackey for the net proceeds of the sale, (R. 25).

Respondent testified that he had known of Petitioner and that it was his understanding that they are a reputable firm (R. 13). Respondent testified that he was acquainted with the fact that Petitioner operated under the Packers and Stockyards Act and that they are required to remit the

proceeds for livestock sold at the close of the following business day after sale (R. 13).

The first notice or knowledge that Petitioner ever possessed or had, that Respondent claimed to have any interest in these cattle, was five days after the Petitioner, as a market agency and federal public utility, had received and sold the cattle and accounted to the shipper, Tobias Brackey, for the proceeds. (R. 25).

PETITIONER'S POSITION.

1. By the terms of the Packers and Stockyards Act, as construed by this Court and by all other federal courts, the status of Petitioner and all other market agencies was changed from that of a private agency to that of a public utility.

2. Petitioner, being changed from the status of a private agency to that of a public utility, could no longer select those whom it would serve and those whom it would not serve, but, on the contrary, was under compulsion to render its services to all comers unless it had knowledge that the title of the shipper and consignor of the livestock was defective or had knowledge to place it upon inquiry.

3. Petitioner, after being changed to the status of a public utility, could no longer determine what it could charge for its services but was required to regulate its charges for services in accordance with the Rules and Regulations of the Secretary of Agriculture under the Packers and Stockyards Act.

4. Petitioner, in the transactions in question, having acted honestly and in good faith and without knowledge of any kind of Respondent's claimed rights or knowledge of any fact that placed it upon inquiry was under compulsion to promptly render its services as a federal public utility to the said shipper, Tobias Brackey.

5. Petitioner, having acted honestly and in good faith and without knowledge of Respondent's claimed rights and being compelled to serve the shipper and consignor, Tobias Brackey, and having no knowledge at that time of any facts to place it upon inquiry, cannot be held liable to Respondent for damages in the transaction of which complaint is made.

6. Respondent made a bona fide sale and delivered the cattle in question to the shipper and consignor, Tobias Brackey, and accepted his check in payment thereof as they had done for a long period of time previously and delivered possession of the livestock to the said Tobias Brackey with full knowledge that he was immediately shipping them to South Saint Paul for resale and waived any right to make claim against Petitioner and any and all other innocent persons.

7. The liability or non liability of Petitioner should be determined under the federal statute in question, the Packers and Stockyards Act of 1921, as amended, and the decisions of the federal courts construing the same and not by the decisions of the courts of the forty eight different states of the Union construing this federal statute.

8. All market agencies, regardless of the state in which they are operating, are in competition with each other and that the liability of market agencies, federal public utilities, should be uniform throughout the states and not different in the different states and that the only method and manner in which uniformity can be determined and fixed is by decision of the federal courts.

9. The questions involved present federal questions for the determination of the federal courts and not questions to be determined differently by the several states of the Union.

10. If the law of Iowa is material, all of which Petitioner denies, the lower Courts failed to follow the law of the State of Iowa as to whether title passed from Petitioner to Tobias Brackey as the same is announced in the cases of *White* v. *Pike*, 240 Ia. 596, 36 N.W. (2d) 761. Under the law of Iowa, as announced in the case of *Crescent Chevrolet Company* v. *Lewis*, 230 Ia. 1074, 300 N.W. 260, Respondent is not entitled to recover because of the theory announced in that case to the effect that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

11. The lower Courts erred in holding that Petitioner's liability remained the same as that of a private agency because the Packers and Stockyards Act contained no provision to the contrary and entirely overlooked the fact that the Interstate Commerce Act contained no provisions granting immunity to common carriers. The immunity granted such common carriers was not on account of any provision of the Interstate Commerce Act - on the contrary, it was granted by the courts on account of the compulsory nature of their services. The lower Courts further overlooked the fact that the compulsory nature of market agency services are the same as those of a common carrier, under the Interstate Commerce Act.

12. The lower Courts also overlooked the fact that common carriers receive livestock at the point of origin where they have offices and facilities to conduct an investigation and market agencies receive it several hundred miles from the point of origin where they have no facilities for investigation.

13. The lower Courts overlooked the fact that to hold Petitioner liable under the undisputed facts in this case, when such Petitioner, a federal public utility, could not

be held liable in the states of Missouri, Kentucky, Nebraska and Montana, denied this Petitioner an equal protection of the law guaranteed by the federal Constitution.

14. The lower Courts overlooked the fact that to hold Petitioner liable under the undisputed facts in this case would prevent all persons exercising ordinary judgment and ordinary due diligence and care from engaging in the business of a market agency and thereby unlawfully burden Interstate Commerce and thus, in the future, will prevent the free flow of livestock through the centralized markets for which purpose the Packers and Stockyards Act was enacted, in addition to other purposes.

15. The lower Courts entirely overlooked the fact that the effect of their decisions was to deny Petitioner its property without due process of law in violation of the federal Constitution.

16. The lower Courts entirely overlooked the fact that Petitioner, as a federal public utility, could not require of one shipper and consignor the performance of any act that it did not require of all shippers and consignors.

JUDGMENT OF THE UNITED STATES DISTRICT COURT OF MINNESOTA.

This opinion is reported in 100 F. Supp, at page 781 *et seq.*

The District Court held that on the question as to whether title passed from Respondent to Tobias Brackey and as to whether Respondent waived the right to claim any interest by his conduct was to be governed by the law of the State of Iowa and not otherwise and that Petitioner and other market agencies could protect themselves by requiring shippers and consignors to furnish indicia of title, or a bond or insurance against loss and rendered judgment in favor of Respondent for the full value of the livestock.

JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This opinion has not as yet been officially reported. It is found in the Record pages 50 to 54.

The Circuit Court of Appeals for the Eighth Circuit held that, under the facts in the case, the liability or non-liability of Petitioner did not present a question under the federal statutes for the determination of the federal courts or any federal question, but, on the contrary, presented a question to be determined according to the laws of the States of Iowa and Minnesota and that it was not necessary, under the federal Act, for the liability of the market agencies to be uniform. (R. 53 and 54).

QUESTIONS PRESENTED.

I.

EXEMPTION OR IMMUNITY FROM LIABILITY.

QUESTIONS.

1. Can a market agency which has been converted by federal statutes from the status of a private agency into a national public utility and thus required to render its services in the sale of livestock to all comers of whom it has no knowledge, or knowledge of any fact to place it upon inquiry that it should refuse its services, be held liable in conversion for performing the duties and responsibilities thus imposed upon it when it performed its duties as a public utility honestly and in good faith?

2. Can the Packers and Stockyards Act be construed as it has been construed by this court and the other federal tribunals so as to convert Petitioner and all other market agencies from the status of a private agency to that of a public utility, thus imposing upon Petitioner and all other

market agencies all the burdens, duties, regulations, and responsbiilities of a public utility and yet allow state courts to deny to Petitioner and all other market agencies the benefits, privileges, and immunities enjoyed by all other public utilities since we have been a nation?

3. Can the Federal Government compel Petitioner and all other market agencies, when such market agencies have no knowledge that a shipper's title to livestock is in any way defective, and when they have no knowledge of any facts to place them upon inquiry, to promptly receive and promptly sell all livestock consigned to them for sale, and thereafter to promptly account to the shipper for the proceeds; and then permit the state courts of any of the states to impose upon Petitioner and all other market agencies the binding obligation of becoming the insurers of the title to the livestock which they are thus required to promptly receive and sell, as well as the guarantors of the honesty, integrity, and sincerity of the customers whom Petitioner and all other market agencies are thus compelled to serve? Can the courts compel such market agencies, public utilities, to become responsible for the bad judgment of vendors of livestock, whether they be the owners of the livestock or auctioneers, in selling the livestock to people without proper payment before the delivery of the livestock?

4. Should market agencies, national public utilities, required to serve the public under the regulations of the Federal Government, in some states of the Union be entitled to the exemptions, immunities, privileges, and benefits granted all public utilities for having innocently received and sold mortgaged or stolen property, and like market agencies, national public utilities, operating in the same manner in other states be denied such exemptions, immunities, privileges, and benefits and have imposed upon them the liability, obligation and responsibility of becoming the insurers

of the title to all livestock they are thus compelled to promptly receive and sell, as well as the guarantors of the honesty, sincerity, and integrity of the customers they are thus required to serve?

5. Should a party, like Respondent, be permitted to deal with and sell to a certain speculator livestock for many years, accepting his individual check in payment thereof, and who had on each occasion delivered an indicia of title by delivering an account sales marked paid and who, at the time of the delivery of said indicia of title to the livestock, testified that it was no longer interested in the cattle and at the time of the delivery of the possession of the livestock and receipted account sales had full knowledge that the party with whom it had been dealing, and to whom the sale was made and possession of the livestock delivered, was immediately shipping the livestock to a centralized market for immediate sale, be entitled to recover from such public utility the value of the livestock, or any sum, when the first notice that such public utility received that such vendor claimed an interest in the livestock was several days after such public utility had performed its duties as a market agency and several days after it had accounted and remitted to its shipper and consignor and who was the Respondent's vendee, the net proceeds of such sale?

6. Should market agencies, federal public utilities, become guarantors of the honesty of every citizen to whom the owners of livestock or conductors of auction rings sell livestock for the owners or the benefit of such auction sales?

7. Can Petitioner, a market agency and federal public utility, or any other market agency, require of one shipper or consignor the performance of any act that it does not require of all shippers and consignors without violating the Packers and Stockyards Act forbidding discrimination?

8. Under the Federal Act in question, the Packers and Stockyards Act of 1921, as amended, can Petitioner, or any other market agency, adopt rules and regulations and does not the Act in question vest the exclusive right to adopt rules and regulations governing market agencies in the Secretary of Agriculture?

II.

IF MATERIAL DID NOT THE LOWER COURTS FAIL TO APPLY THE LAW OF IOWA ON THE QUESTIONS INVOLVED.

9. If material, all of which this Petitioner denies, did the lower Courts claiming to have decided the case in accordance with the law of Iowa err in not following the case of *White* v. *Pike,* 240 Ia. 596, 36 N.W. (2d) 761, the last announcement by the Supreme Court of Iowa as to whether title passed to Tobias Brackey and as to whether Respondent did not waive any claim of title to the property in question, which overruled any contention to the contrary announced by the Supreme Court of Iowa in the case of *Birmingham* v. *Rice Brothers,* 238 Ia. 410, 26 N.W. (2d) 39, the decision of a divided court—five to four?

10. The lower Courts announced as authority for their holdings the decision of the Supreme Court of Iowa in the case of *Crescent Chevrolet Company* v. *Lewis, et al.,* 230 Ia. 1074, 300 N.W. 260, at 262. Did the lower Courts not overlook the fact that this decision failed to sustain the lower Courts and did they not overlook the fact that their conclusion was contrary to the decision of the Supreme Court of the State of Iowa in the above case, as well as the case of *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Flanders,* 56 Fed. (2d) 114 at 117 and 119, which involved an Iowa transaction similar to the one in question?

III.

CONSTITUTIONAL QUESTIONS.

11. Did not the lower Courts in holding under the undisputed facts in the case at bar that Petitioner, a federal public utility, was liable in conversion, when other market agencies, federal public utilities, competitors of Petitioner, operating in the states of Missouri, Kentucky, Nebraska and Montana were immune from liability in like transactions, deny this Petitioner an equal protection of the law guaranteed by the Federal Constitution and particularly the Fourteenth Amendment thereof?

12. Did not the lower Courts, by holding Petitioner liable under the undisputed facts in the case at bar, lay down a rule which would prevent all persons exercising ordinary judgment, due diligence, care and precaution from continuing to engage in the business of a market agency and all similar persons from attempting to engage in like businesses and thereby unlawfully burden Interstate Commerce by preventing the free flow of livestock through the centralized markets for which purpose, as stated in the decision of the late Chief Justice Taft, speaking for this Court in the case of *Stafford* v. *Wallace,* 258 U.S. 495 at 514 to 516, inclusive, 66 L. Ed. 735 at 741, the Packers and Stockyards Act was enacted?

13. Did not the lower Courts under the undisputed facts in this case, by their decision, deny Petitioner its property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The eight questions raised under Division I of this petition, entitled "Questions Presented", are questions as to what exemptions and immunities are granted market agencies when they were converted by the Packers and Stockyards Act from the status of private agencies to that of federal public utilities under the exclusive control of the Packers and Stockyards Act and the supervision and lawful regulations of the Secretary of Agriculture of the United States.

A decision on these questions is of great importance to all the citizens in every State of the Union engaged in the business of a market agency. This is necessarily true when considered in the light of the fact that by decisions of this Court, and practically all the decisions of all federal and state courts, it was recognized that Petitioner and all other market agencies were converted, by the federal act in question, from private agencies into national public utilities, required to promptly serve all comers when they had no knowledge of facts to place them on inquiry which would require them to refuse their services.

The decisions of the lower Courts held that although market agencies were federal public utilities, they were the insurers of the title to all livestock which they were required to promptly receive and sell and promptly account to the shipper and consignor for the proceeds, and at the same time were the guarantors of the honesty, sincerity, character and integrity of all customers, shippers and consignors whom they were thus required to serve. That they were the guarantors of the honesty, sincerity, character and integrity of all persons to whom either own-

ers, agents, factors or auctioneers sold and delivered possession of cattle, knowing that they were being immediately shipped for resale at the time of delivering possession. This holding becomes most startling when further considered with the fact that each year there are shipped to and sold in the centralized markets cattle, calves, hogs, sheep and lambs for slaughter for meat and food purposes of a value of many millions of dollars.

In view of the perilous condition in which all market agencies find themselves, since the decisions of the lower Courts in these two cases, and the number of other cases of a similar nature involving substantial amounts now undecided, undetermined and pending in the courts of this nation, the question of liability of a market agency under similar facts should be determined by this Court because the question of liability presents a question arising under a federal statute to be determined by the federal courts.

All market agencies, regardless of the location of the market and the state where they operate and in which the different market agencies are licensed, are in competition with each other. The question of the liability should be uniform throughout the Nation and the only way that it can be made uniform throughout the Nation is by a decision of this Court. They should now be informed as to what liabilities are imposed on market agencies so that those now engaged in the market agency business can determine whether they can afford to continue in such business with such liability imposed upon them.

The questions involved present adequate and sufficient grounds for this Court to grant a Writ of Certiorari and weigh the entire matter on its merits and to determine the law which should govern these cases in the future.

Summarizing this statement:

A. The questions involved are federal questions of substance not heretofore determined by this Court.

B. The questions involve Petitioner's rights, privileges and immunities under the Packers and Stockyards Act, the Constitution of the United States and the prior decisions of this Court.

C. These questions present rights, privileges and immunities claimed by the Petitioner under authority exercised by the Government of the United States.

II.

The questions under Division III of the "Questions Presented" involve substantial constitutional questions arising under the Federal Constitution and present questions to be determined by this Court. Certainly Petitioner, and all other market agencies, should be advised whether the decisions of the lower Courts denied to this Petitioner an equal protection of the law; whether the decisions of the lower Courts will affect the public generally by unlawfully burdening Interstate Commerce; whether the decisions of the lower Courts, under the undisputed facts in this case, deprived Petitioner of its property without due process of law in violation of the Federal Constitution.

Wherefore, it is respectfully submitted that Petitioner's prayer for a Writ of Certiorari to review said judgment of the United States Court of Appeals for the Eighth Circuit should be granted.

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BRIEF AND ARGUMENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Reference is made to the foregoing petition for summary statement of the case, citation to opinions below, and statement as to jurisdiction.

II.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Petitioner adopts "Questions Presented" in the foregoing petition on pages 9 to 13, inclusive, as Petitioner's specifications and assignments of error.

III.

SUMMARY OF ARGUMENT.

Petitioner adopts "Reasons Relied upon for the Allowance of the Writ" in the foregoing petition on pages 14 to 16, inclusive, as its Summary of Argument.

ARGUMENT.

1.

THE PACKERS AND STOCKYARDS ACT CONVERTED LIVESTOCK COMMISSION MERCHANTS OR MARKET AGENCIES INTO NATIONAL PUBLIC UTILITIES, WITH THE SAME STATUS AS COMMON CARRIERS, PUBLIC WAREHOUSEMEN, OR OTHER BUSINESSES IMPRESSED WITH THE PUBLIC USE.

The Packers and Stockyards Act is found in Chapter 9, Title 7, U.S.C.A., Sections 181 to 231, inclusive, Sections 201 to 217, inclusive, being applicable to the questions under consideration.

The terms "stockyards services" and "market agency" are defined in Section 201 as follows:

> "(*b*) *The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.*
>
> "(*c*) *The term 'market agency' means any person engaged in the business of* (1) *buying or selling in commerce livestock at a stockyard on a commission basis or* (2) *furnishing stockyard services.*" (*Subsections b and c, Section* 301 *of Title III of the Act.*) (Emphasis ours.)

Section 202 provides methods and procedure for the Secretary of Agriculture to designate regulated stockyards.

Section 203 requires the registration of all market agencies operating at such stockyards.

Section 204 requires the bonding of market agencies.

Section 205 provides that:

> *"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard* • • • ." (Emphasis ours.)

Section 206 provides that:

> *"All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."* (Emphasis ours.)

Section 207 requires market agencies to keep on file for public inspection schedules of their rates and charges, subject to the approval of the Secretary of Agriculture.

Section 208 prohibits and declares to be unlawful any unjust, unreasonable and discriminatory practices in respect to furnishing stockyard services.

Section 209 makes market agencies civilly liable to any person injured by their violation of the Act.

Sections 210 and 211 set out forms of procedure before the Secretary of Agriculture to enforce such liabilities. The remainder of the Act sets out further procedures for its enforcement.

This Court, in the case of *Stafford* v. *Wallace,* 258 U.S. 495, 66 L. Ed. 735, in upholding the validity and constitutionality of the Act, definitely determined the *status* of a market agency to be that of a *national public utility.* In doing so, this Court, speaking through Mr. Chief Justice Taft, on Pages 514 and 516 of 258 U. S. and page 741 of 66 L. Ed., said:

> *"The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and Southwest through the great*

stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products, to the consuming cities of the country in the Middle West and East, or, still as live stock to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

"The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainloads lots, AND MUST BE PROMPTLY SOLD AND DISPOSED OF AND MOVED OUT TO GIVE PLACE TO THE CONSTANTLY FLOWING TRAFFIC THAT PRESSES BEHIND. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character.

"THE COMMISSION MEN ARE ESSENTIAL IN MAKING THE SALES WITHOUT WHICH THE FLOW OF THE CURRENT WOULD BE OBSTRUCTED, AND THIS, WHETHER THEY ARE MADE TO PACKERS OR DEALERS. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, NOT INTERFERING WITH, BUT ON THE CONTRARY, BEING INDISPENSABLE TO ITS CONTINUITY. The origin of the live stock is in the West; its ultimate destination, known to, and intended by all, engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. THE STOCKYARDS AND THE SALES ARE NECESSARY FACTORS IN THE MIDDLE OF THIS CURRENT OF COMMERCE.

"THE ACT, THEREFORE, TREATS THE VARIOUS STOCKYARDS OF THE COUNTRY AS GREAT NATIONAL PUBLIC UTILITIES TO PROMOTE THE FLOW OF COMMERCE FROM THE RANGES AND FARMS OF THE WEST TO THE CONSUMERS IN THE EAST." (Emphasis ours.)

In the case of *Wallowa National Bank* v. *Scrier Commission Co.*, 138 Ore. 393; 5 Pac. (2d) 100, at page 102, the Supreme Court of Oregon said:

"We fully agree with counsel that the Packers and Stockyards Act of 1921 *was largely copied from, where applicable, and is analogous to, the Inter-State Commerce Act. It is intended to do for the shipper of livestock to stockyards in the way of stockyard service, what the Inter-State Commerce Act* (49 *U.S.C.A., Sec.* 1, *et seq.*) *does for the shippers in the matter of transportation."* (Emphasis ours.)

It is likewise settled law that, under the Act in question, the Secretary of Agriculture, subject to proper procedure regulating all administrative bodies, possesses the authority to fix and regulate the maximum commission rates chargeable by market agencies for the purchase and sale of livestock.

A.T. & S. F. R. R. Co. v. *United States*, 295 U.S. 193, at 201, 79 L. Ed. 1382 at 1389.

Tagg Bros. & Moorhead v. *United States*, 29 Fed. (2d) 750, at 752 and 753.

Tagg Bros. & Moorhead v. *United States*, 280 U.S. 420, at 435, 438, 439, 74 L. Ed. 524, at 532, 533.

Morgan, et al. v. *United States*, 298 U.S. 468, 80 L. Ed. 1288.

With equal certainty, the law has been determined to be that, since the enactment of the Act, market agencies can

no longer choose their customers or refuse to deal with others engaged in the livestock business at the regulated markets.

Farmers Livestock Commission Co. v. *United States*, 50 Fed. (2d) 375, at 379.

United States of America v. *American Livestock Commission Company, et al.*, 279 U. S. 435, 73 L. Ed. 787.

In the case of the *United States* v. *Donahue Bros., Inc.*, 59 Fed. (2d) 1019, the court had before it the validity of an order of the Secretary of Agriculture requiring a market agency to keep funds derived from the sale of livestock in a trust account and not to commingle them with the market agency's individual funds. In upholding the validity of the Secretary's order, the Court of Appeals, on Page 1023, said:

> " • • • *The proper handling of shippers' funds and their proper transmission to the shipper is a part of defendant's duty in performing stockyard services. The sale of livestock contemplated by this act is not completed until all the services which the market agency is called upon to perform have been performed. That service is not complete until the agency has fully accounted to the shipper for the proceeds of the livestock sold. The regulation of any sale which disregards accounting to the shipper for the proceeds would be of doubtful value to the shipper.* • • • " (Emphasis ours.)

2.

A PUBLIC UTILITY MUST SERVE ALL APPLYING FOR ITS SERVICES WITHOUT DSCRIMINATION OR DELAY.

The difference between a private business and a public utility is clear and definite. One engaged in a private business can select those with whom he will deal and can de-

termine the terms and conditions upon which he will deal. Public utilities, on the other hand, cannot refuse without a lawful excuse to serve anyone applying for their services. They must serve all alike; they must render their services to anyone requesting them. This has been the law long and well settled.

In 51 C. J. 7, Sec. 16, the text writer clearly states the law upon this question, and says:

> *"A public utility is obligated by the nature of its business to furnish its service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination, and it must, to the extent of its capacity, serve all who apply, on equal terms and without distinction, so far as they are in the same class and similarly situated. Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select or furnish its commodity, nor refuse to one a favor or privilege it has extended to another, since the term 'public utility' precludes the idea of service which is private in its nature and is not to be obtained by the public."* (Emphasis ours.)

In the case of *People ex rel. Western Union Telegraph Co.* v. *Public Service Commission*, 230 N.Y. 95, 129 N.E. 220, the court, on Page 221 of 129 N. E., said:

> *"It is well settled that all who deal with a public service corporation are to be treated alike and favor cannot be extended to one which is not offered to another; nor can a privilege given to one be refused to another"* (Emphasis ours.)

See also:

Highland Dairy Farms Co. v. *Helvetia Milk Condensing Co.*, 308 Ill. 294, at 300, 139 N.E. 418, at 421.

Inter-Ocean Publishing Co. v. *Associated Press*, 184 Ill. 438, at 448, 56 N. E. 822, at 824.

3.

SUMMARY AND ANALYSIS OF THE EFFECT OF THE ENACTMENT OF THE PACKERS AND STOCKYARDS ACT UPON PETITIONER AND ALL OTHER MARKET AGENCIES.

It is clear under the law that after the enactment and effective date of the Packers and Stockyards Act:

1. *Petitioner's status was changed from that of a private agency to that of a national public utility.*

2. *Thereafter, petitioner, having no knowledge of any fact to justify its refusal to render its services, was required to promptly receive, sell, and account for the proceeds of all livestock consigned to it for sale.*

3. *By rules of the Secretary of Agriculture petitioner was compelled to keep funds arising from such sale separate from its own funds so that petitioner could promptly account to the shipper and consignor for livestock consigned to it for sale.*

4. *Petitioner can no longer select those to whom it will render its services or those to whom it will not render its services, but is required to render its services to all those who apply therefor unless petitioner has knowledge of facts which would permit it to lawfully refuse to render such services.*

5. *Petitioner, for its services and compensation can only charge and receive the rates and amounts approved by the Secretary of Agriculture.*

6. *Petitioner cannot exact from one customer a showing as to title or right which it does not exact from all of its customers, as its service must be rendered without discrimination.*

4.

UNDER THE LAW, LONG AND WELL SETTLED, IN THE JURISPRUDENCE OF THIS NATION, A PUBLIC UTILITY, UNDER COMPULSION TO SERVE THE PUBLIC WITHOUT DISCRIMINATION, AND WHICH CANNOT CHOOSE ITS CUSTOMERS BUT MUST SERVE ALL COMERS AT APPROVED AND REGULATED RATES, CANNOT BE HELD LIABLE FOR HANDLING MORTGAGED OR STOLEN PROPERTY WHERE THE SERVICE RENDERED WAS DONE AT THE INSTANCE OF A PERSON IN POSSESSION, AND WHERE SUCH PUBLIC UTILITY HAD NO KNOWLEDGE OF THE RIGHTS OF SOME THIRD PERSON, OR ANY FACT OR FACTS TO PLACE IT UPON INQUIRY.

In the case of *Abernathy* v. *Wheeler*, 92 Ky. 320, 17 S.W. 858, 36 A.L.R. 593, at pages 858 and 859 of 17 S.W., it is said:

> *"Wheeler, Mills & Co., mortgages, etc., sued Abernathy & Long and C. S. Anderson, etc., for the price of said tobacco. It is admitted that Abernathy & Long received and sold said tobacco AS PUBLIC WAREHOUSEMEN IN THE USUAL COURSE OF BUSINESS AND PAID THE PROCEEDS OF SALE TO C. S. ANDERSON, WITHOUT ACTUAL NOTICE OF THE EXISTENCE OF APPELLEE'S MORTGAGE. Are Abernathy & Long responsible for the sum for which the tobacco was sold? We think not. They were PUBLIC WAREHOUSEMEN, for the purpose of receiving the tobacco of the producer and selling it at public auction in consideration of receiving pay for storage and certain commission on the sales. They assumed the obligation of serving the entire public in the matter of receiving and selling the tobacco of the producer, and they had no right to select their customers and refuse others, provided they conformed to the reasonable rules and regulations of the house. See NASH V. PAGE,* 80 Ky. 539. *It is not contended that the warehousemen had any interest in the tobacco what-*

ever; they were only entitled to a commission FOR MAKING THE SALE AND TO BE REIMBURSED FOR THEIR OTHER EXPENSES AND TROUBLE IN RECEIVING AND HANDLING THE TOBACCO. SO, THE QUESTION IS, ARE THEY RESPONSIBLE TO THE MORTGAGEES OF THE TOBACCO, AS FOR A CONVERSION OF IT? That *question seems to be settled in principle in NEWCOMB* v. *BASKETT*, 14 Bush. 658. *It is there settled that a public warehousman, receiving, storing and selling goods in his line of duty on commission, and having no property interest in the goods, and having no notice of an adverse claim on them, is not guilty of a conversion of them by the mere sale of them on account of the person that consigns them to his house for sale. In such case, the warehouseman asserts no interest in the goods or right to them hostile to the mortgagee or true owner; he simply acts as the custodian and mouthpiece of the apparent owner. No one would contend that had C. S. Anderson employed the appellants as auctioneers to sell the tobacco at auction on the streets of Hopkinsville, they receiving a compensation for their services only, and having no property right in the tobacco, they would have been liable to the appellees as for a conversion of the tobacco. Why? Because they asserted no right or interest hostile to the appellees but acted simply as the intermediaries, or indifferent parties, between the apparent owner of the tobacco and the bidders for it. SO HERE THEY ACT AS PUBLIC INTERMEDIARIES IN RECEIVING AND SELLING THE TOBACCO, NOT HAVING ANY INTEREST THEREIN, BUT FOR COMPENSATION MERELY; AND WHEN THE TOBACCO IS PRESENTED TO THEM FOR PUBLIC STORAGE AND SALE BY THE APPARENT OWNER, IN THE USUAL WAY, AND THEY, HAVING NO KNOWLEDGE OR INFORMATION THAT OTHERS HAD AN ADVERSE INTEREST IN THE TOBACCO, AND THERE BEING NO FACT OR*

CIRCUMSTANCE ATTENDING THE TRANSACTION THAT SHOULD PUT THEM, AS PERSONS OF ORDINARY PRUDENCE, UPON INQUIRY AS TO THE RIGHTS OF OTHERS IN REFERENCE TO THE TOBACCO, IT WOULD NOT BE IN THE INTEREST OF TRADE TO REQUIRE THEM TO INSTITUTE INQUIRY AND INVESTIGATION BEFORE SALE AS TO TRUE CONDITION OF THE TITLE OF THE TOBACCO." (Emphasis ours.)

Another leading case discussing the general principles on which Petitioner is relying is that of *Shellnut* v. *Central of Ga. Railroad*, 131 Ga. 404, 62 S. E. 294, wherein the Court, on Page 296, said:

"It seems to be a well settled principle that a common carrier is guilty of no conversion 'though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner. * * * *COMMON CARRIERS BY REASON OF THE NATURE OF THEIR BUSINESS, WHICH IMPERATIVELY REQUIRES THEM TO RECEIVE AND FORWARD GOODS WHEN TENDERED IN THE USUAL COURSE OF THEIR BUSINESS, HAVE LONG FORMED AN EXCEPTION TO THE STRINGENCY OF GENERAL RULES IN RESPECT TO WHAT CONSTITUTES, IN SIMILAR CASES, A CONVERSION. 'The authorities on this point are abundant': (Citing cases) 'A COMMON CARRIER MUST ACCEPT FREIGHT FROM EVERY ONE OFFERING THE SAME, AND IS NOT GUILTY OF CONVERSION IN ACCEPTING FREIGHT FROM A PARTY IN POSSESSION THEREOF, unless the true owner intervenes before the goods are delivered and demands them.'"* (Emphasis ours.)

Moore on Carriers, 2nd Ed., Pages 283-284, states the law to be:

> *"A COMMON CARRIER MUST ACCEPT FREIGHT FROM EVERY ONE OFFERING THE SAME, AND IS NOT LIABLE FOR CONVERSION TO THE TRUE OWNER IN ACCEPTING FREIGHT FROM A PARTY APPARENTLY RIGHTFULLY IN POSSESSION THEREOF, unless the owner intervenes before the goods are delivered and demands them, and gives notice of his right to the property and his intention to enforce it, though the shipper had no right to possession in fact."* (Emphasis ours.)

That such is the settled law appears without doubt. See:

Hall v. *Cumberland Pipe Line Co.*, 193 Ky. 728, 237 S. W. 405, at 408;

Live Stock Commission Co. v. *C. M. and St. Paul R. R. Co.*, 87 Mo. App. 330, at 339;

Switzler v. *Northern Pac. Ry. Co.*, 45 Wash. 221, 88 Pac. 137, at 139;

Johnston v. *C. B. & Q. Ry. Co.*, 70 Neb. 364, 97 N. W. 479, at 482;

A. T. & S. F. R. R. Co. v. *International Land and Invest. Co.*, (8th C.C.A.), 247 Fed. 265, at 267-68;

Fields, et al. v. *Blane, et al.*, (Ky.) 18 Ky. L. 675, 37 S. W. 850;

Nanson v. *Jacobs*, 93 Mo. 331, 3 Am. St. Rep. 531; 6 S.W. 246;

Dixon v. *So. Pac. Co.*, 42 Nev. 73, 172 Pac. 368, at 369-70; affirmed on rehearing, 177 Pac. 14, at 14-15;

Shellenberg v. *Freemont R. R. Co.*, 45 Neb. 487, 63 N. W. 859;

Gurley v. *Armstead*, 148 Mass. 267, 2 L. R. A. 80, 19 N. E. 389, at 390;

Thoms v. *D. C. Andrews & Co., Inc.*, 54 Fed. (2d) 250, at 252, 253;
Kohn, et al. v. *Richmond & D. R. Co.*, 37 S. C. 1, 16 S. E. 376;
Roanoke Banking Co. v. *J. E. Dunson Bros. & Co.*, 30, Ga. App. 341, 117 S. E. 826;
27 R. C. L., Sec. 61, Page 1000;
9 American Jurisprudence, at 625.

The reason for this long and well settled rule is obvious. Were the rule to be otherwise, no one with safety could engage in the business of such a public utility in whose favor the rule has been evoked.

Common carriers, in whose favor the rule has been stringently enforced, receive the livestock at the point of origin where such carriers maintain offices and agents, and are therefore in a position to conduct an investigation as to title. Still the law has always excused them from such an investigation on account of the compulsory nature of their services.

A market agency receives the livestock sometimes many hundreds of miles from the point of origin. It has no way, within a reasonable length of time, to check or investigate the title of the consignor.

As pointed out by Chief Justice Taft, in the case of *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735, thousands of head of livestock arrive daily and must be promptly sold and disposed of, and moved out to give place to the constant flow of traffic that presses behind.

Common experiences compels the court to take judicial knowledge of the fact that the facilities of a stock yard, including those of commission merchants or market agencies, are not such as would permit the holding of livestock

for the purpose of making an investigation of title of the numerous shipments of cattle, calves, hogs, sheep, lambs and other livestock received daily. We repeat the observation of Chief Justice Taft that the livestock must be sold and promptly moved out of the stockyards to make way for the ensuing deliveries.

If a carrier receiving personal property at the point of origin, or a public warehouseman, is not required to investigate the title of the shipper or consignor and is not liable in conversion for dealing with the same unless it has actual knowledge of the rights of the other party, then surely a market agency, many miles distant from the point of origin, receiving the livestock under conditions that require its prompt receipt, sale and disposal, should not be required to investigate the title of the consignor in possession. Certainly, such market agency should not be held liable in conversion if the title of the consignor is defective, unless such market agency has actual knowledge that the consignor's and shipper's title is defective, or of facts that would place them upon inquiry.

One's eyes cannot be shut to the fact that, if the burden is placed upon livestock commission merchants, market agencies, and national public utilities to investigate and determine the title of all livestock consigned to them for sale, the cost of such investigation would be many times more than the amount they receive for their services in receiving, caring for, exhibiting for sale, selling, collecting and remitting the proceeds. The length of time such market agency could stay in business then would only depend upon the amount of assets it had at the beginning.

5.

THE QUESTION AS TO WHETHER PETITIONER, A MARKET AGENCY, A FEDERAL PUBLIC UTILITY, UNDER THE UNDISPUTED FACTS IN THIS CASE, IS OR IS NOT LIABLE PRESENTS A FEDERAL QUESTION ARISING UNDER THE PACKERS AND STOCKYARDS ACT FOR THE DETERMINATION OF THE FEDERAL COURTS ALONE, AND NOT A QUESTION TO BE DETERMINED DIFFERENTLY BY THE FORTY-EIGHT STATES IN THE UNION, WHICH MIGHT ARRIVE AT AS MANY DIFFERENT DECISIONS AS THERE ARE STATES IN THE UNION. THEREFORE, THIS QUESTION OF LIABILITY SHOULD BE DETERMINED AND SET AT REST BY DECISION OF THIS COURT.

As we have previously pointed out in a preceding point of this brief, it must be presumed that when Congress enacted the Packers and Stockyards Act and changed the status of livestock commission merchants from the status of a private agency to the status of a national public utility, because their business is coupled with a public use, it was fully cognizant of the restrictions, obligations, duties and liabilities thus imposed upon them as such public utility. It likewise must be presumed that Congress knew of the privileges, rights, immunities and benefits to which such public utilities were entitled by reason of this conversion and the compulsory nature of their services.

It is the familiar principle of statutory construction that a legislature is presumed to have acted with full knowledge of judicial decisions under pre-existing similar laws.

Thompson v. *United States*, 246 U. S. 547, at 551; 62 L. Ed. 876, at 879.

This Court, in speaking on Page 551 of 246 U. S. and Page 879 of 62 L. Ed., said:

> *"We have found that Par.* 162, *relied upon by appellant, is sufficiently clear in meaning, and we cannot doubt that if the Congress had intended by it to change the law as evidenced by the Whitfield decision, of which we must assume that it had full knowledge* (*Chesapeake & P. Teleph. Co.* v. *Manning,* 186 U. S. 238, 245, 46 L. Ed. 1144, 1147, 22 Sup. Ct. Rep. 881), *it would have done so in plain terms, especially in a matter of such great importance as we have here, and that language would not have been used which, as we have seen, confers jurisdiction upon the court of claims only in cases which are clearly consonant with and within the scope of that decision."* (Emphasis ours.)

See also 59 C. J. Section 600.

It was, therefore, clearly the intention of Congress to regulate the business of market agencies which they converted into public utilities because their business was affected by a public use. It was further clearly the intent of Congress that their liabilities, rights and immunities would be the same as all other public utilities, that the Act would so be given effect in all cases in all courts, whether state or federal. This is the obvious interpretation to be placed on and certainly was intended by Congress to be attributed to the statute. It was clearly the intent of Congress to say that the liabilities of a market agency could not be construed by courts, state or federal, to be the same as a private agent which possessed the right to select its own customers.

In effect, Congress said to the commission men: "You are no longer free to select your own customers. You must serve, under the terms of this Act, indiscriminately all who apply for your services."

At the same time, the Congress said to the several states: "You must henceforth, for the purpose of your decisions, treat the market agencies as factors whose business is affected by a public use and regulated in the interest of the free flow of interstate commerce and livestock." The Congressional determination is as binding upon the States as it is upon the commission men, marketing agencies. It should have been so interpreted and applied by the courts below in the case at bar. The Act cannot be interpreted, as it was by the courts below, to mean that each state of the nation is at liberty to say, if it likes, that such marketing agencies:

(1) Were deprived of their right to select their own customers;
(2) Required to render services at rates fixed by the Secretary of Agriculture;
(3) To furnish security for the performance of their financial obligations; and
(4) In addition, become insurers of the good faith and honesty of the customers thrust upon them by the mandate of the law.

Such an interpretation of the Act plainly deprives market agencies of their property without due process of law. Congress did not intend that either it or the States should impose an unconstitutional burden upon commission men.

It has been suggested that Section 308 of the Act, which is sub-paragraph (b) of Section 209, Title 7 U.S.C.A., does not change the petitioner's liability from that of a private agency, which section, after imposing liability on market agencies for violation of any of the Act, provides by the last part of paragraph (b) in words and figures as follows, to-wit:

> "* * * *but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.* Aug. 15, 1921, c. 64, Sec. 308, 42 Stat. 165." (Emphasis ours.)

This particular section relates only to the right to employ both common law and statutory remedies for violation of the Act. This section of the Act was taken practically verbatim from the Interstate Commerce Act. Its meaning and proper construction has long ago been set at rest by a decision of this Court in the case of *Texas & Pacific Railroad Company* v. *Abilene Cotton Oil Company*, 204 U. S., Page 426; 51 L. Ed., Page 553, wherein this Court, on Pages 446 and 447 of 204 U. S., and on Page 561 of 51 L. Ed., in speaking through Justice White, who later became Chief Justice White, said:

> "*This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.*" (Emphasis ours.)

The case of the *Philco Corporation* v. *Phillips*, 133 Fed. (2d), 663, was an action brought, after Congress enacted the Trademark Act, for an injunction or restraining order. This Act contained practically identical provisions of the Interstate Commerce and the Packers and Stockyards Acts about lessening, impeaching or avoiding any remedy any aggrieved party might have had if the provisions of said Act had not been passed, which was Section 23 of that Act. Previous to the enactment of this Act, injunction proceedings had been held proper. In holding that this Section 23 of the Act could not be interpreted for the pur-

pose of destroying the Act, the Seventh Circuit Court of Appeals, on Page 670, said:

> "*We understand this section to mean two things*: (1) *State common law is still controlling on the questions of trade-mark infringement and unfair competition if either party's mark is used only in intrastate commerce, or if both marks are unregistered or invalid under the Act.* (2) *State common law is still controlling even in interstate commerce on all questions of unfair competition not relating solely to the use of a trade-mark (third category). Since the goal of the Act is uniform treatment of trade-marks used in interstate commerce, Par. 23 may not be interpreted to destroy the Act.*" (Citing cases.) (Emphasis ours.)

The Court further, on Pages 671-672, said:

> "*In our opinion, neither of these views is correct. The policy of a statute which Congress has enacted under its constitutional power to regulate interstate commerce may not be defeated or obstructed by State law, whether decisional or statutory.* (Citing cases)
> • • •
> "*Through the Trade-Mark Acts of 1905 and 1920 Congress has occupied that part of the field of unfair competition in interstate commerce having to do with 'passing off' effected solely by the use of a trade-mark. THE INTENTION OF CONGRESS WAS TO ACHIEVE UNIFORMITY WITHIN THE AREA OCCUPIED. IN SO FAR AS STATE LAW CONFLICTS WITH THIS POLICY OF THE TRADE-MARK ACTS, IT MUST YIELD TO THE SUPERIOR FEDERAL LAW. Clause 2, Article VI, Constitution of the United States. Federal law still governs cases in (a) of the second category, but now requires that no injunction issue.*" (Emphasis ours.)

In the case of *Lichten* v. *Eastern Airlines, Inc.*, 189 Fed. (2d) 939, (2nd C.C.A.), the court had before it a provision in the tariffs of an airline company exempting it from liability in the loss of jewelry. The court, in sus-

taining this exception and in speaking of the Civil Aeronautics Act of Congress, on Page 941 said:

> *"A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. Civil Aeronautics Act Pars.* 404 (a), 902 (a), 49 U.S.C.A. *Pars.* 484 (a), 622 (a). *To achieve this, it is essential, in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services. Cf. Southern Ry.* v. *Prescott,* 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836. *Accordingly, this broad regulatory scheme, and not the common law, must govern the contract of the parties. Adams Express Co.* v. *Croninger,* 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314; *Mack* v. *Eastern Air Lines, Inc., supra."* (Emphasis ours.)

In the *Second Employers Liability Cases,* 223 U. S. 1, 56 Law Ed. 327, this Court, in speaking of the effect upon state law of the enactment of the Federal Employers Liability Act, on Page 55 of 223 U. S., and Page 348 of 56 Law Ed., said:

> *"And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.* (Citing cases)." (Emphasis ours.)

In the case of the *Postal Telegraph & Cable Co.* v. *Warren-Goodwin Lumber Co.,* 251 U. S. 27, 64 Law Ed. 118, this Court, in speaking through Chief Justice White, on Page 30 of 251 U. S. and Page 120 of 64 Law Ed., upon the effect of the Act of 1910 to regulate commerce and especially telegraph companies, said:

> *"In the first place, as it is apparent on the face of the Act of* 1910 *that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of* 1910 *was designed to*

and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish,—a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting local laws." (Empasis ours.)

Congress in the exercise of its constitutional power to regulate interstate commerce has by the Packers and Stockyards Act now occupied the field to the exclusion of all but the most minor of state regulations. It is, therefore, improper for a State to enter it either by decision or by statute.

One of the primary purposes of the Packers and Stockyards Act which was enacted for the purpose of uniformity and centralization of regulations is achieved thereby. In H. R., Rep. No. 77, to accompany H. R. 6320, 67th Cong., 1st Sess., it was said of the Act, when reported to the Congress, that it "gave the Secretary of Agriculture complete inquisitorial, visitorial, supervisory and regulatory power over the packers, stockyards, and all activities therewith; that it is the most comprehensive measure and extends further than any previous law in the regulation of private business in times of peace, except possibly the Interstate Commerce Act."

Such uniformity of regulations contemplated by the Act will be seriously endangered, as well as the social aims sought to be thereby achieved frustrated, if the philosophy of construction on which the decision below depends is permitted to stand.

Certainly, the liability or non-liability of a market agency, upon identical or similar facts, should be the same

throughout the forty-eight States of the Union, especially when the act of the public utility is an act committed in interstate commerce. The liability imposed upon market agencies, national public utilities, should be uniformly applied in the several States of the Union, and not differently as the decisional law of the different States may vary.

6.

IF THE LAW OF IOWA IS IN ANY WAY MATERIAL, ALL OF WHICH THIS PETITIONER DENIES, THE LOWER COURTS FAILED TO PROPERLY CONSTRUE AND APPLY IT.

(A) The last utterance of the Supreme Court of Iowa on the material law of Iowa applicable to the case at bar the lower courts either overlooked or refused to apply that law as the same was announced by the Supreme Court of Iowa in White vs. Pike, 240 Ia. 596, 36 N.W. (2d) 761, which is the last pronouncement on the subject by that Court.

In the case of *White* v. *Pike,* 240 Iowa 596, 36 N.W. (2d) 761, one David R. Middleton, by theft, obtained blank checks of the Baker Manufacturing Company, of Omaha, Nebraska. Middleton purchased from the plaintiff, White, a new chevrolet automobile for $2,400.00 and gave in payment thereof a check for like amount signed by the Baker Manufacturing Company, by Roland R. Baker, representing himself at the time to be Roland R. Baker, the sole owner of the Baker Manufacturing Company. The plaintiff, White, accepted the check without making inquiry either at the Baker Manufacturing Company or the Omaha bank on which it was drawn. At the time of the transaction in which White accepted the check, White delivered possession of the automobile to Middleton, together with the Nebraska certificate of title which White executed, together with another instrument to be used by the purchaser

in applying for a new certificate of title, which instrument was executed by Middleton under the name of Roland R. Baker, the acknowledgement of both White and the imposter, Baker, being taken by the same Notary Public. This occurred on October 23, 1947.

The next day, Middleton, at Sioux City, Iowa, traded the car to Pike for a used Ford car and $800.00 in cash; and at the time, at the request of the defendant, Pike, Middleton, operating under the name of Roland R. Baker, produced the certificate of title.

The plaintiff then started his action in replevin to recover the car, which in the lower court resulted in a verdict for plaintiff, and which judgment was, by the unanimous decision of the Supreme Court of Iowa, reversed; and in doing so the Court, on Pages 763, 764 and 765 of 36 N.W. (2d), said:

> "*In Parr* v. *Helfrich,* 108 Neb. 801, 189 N.W. 281, 282, *the fraudulent vendee obtained the car by a forged certified check. In holding the fraudulent vendee could transfer title to a bona fide purchaser the court said: 'The inquiry is: Did the owner intend to transfer the ownership as well as the possession of the property? If he did, there was a contract of sale. The essential thing in the pasing of title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention.'*"
>
> "*The cases plaintiff cites are cases of forged title where the owner did not intend to transfer title to the wrongdoer and the latter sold to the bona fide purchaser by means of some alteration or forging the owner's name.* • • • • • *The case well illustrates the distinction between a forged title and a title obtained by any fraudulent scheme, which might include forgery. In the former, bona fide purchaser obtains no better title than his vendor had and the forged title is no title at all. In the latter the bona fide purchaser receives the title his vendor obtained or the apparent title the original owner voluntarily gave.* • • • • • •

"This is not the case where a person, falsely stating that he is the agent or representative of another, obtained possession of goods under pretense of sale to such other. In such cases there is no intention on the part of the vendor to sell to the agent or representative and no title passes.

"Under the admitted facts in this case the defendant was a bona fide purchaser for value without notice. As such he is entitled to protection if his vendor had obtained the possession of the car in a transaction where the original owner intended to give his vendor title or did give him indicia of title. The record is clear that the original owner did intend to give defendant's vendor title and did give him indicia of title. It matters not that forgery was the type of fraud employed by which the owner's intent to pass title was gained. Plaintiff is estopped from repossessing the car in the possession of defendant. The judgment of the trial court is reversed and the cause remanded for judgment for defendant.

"Reversed and remanded." (Emphasis ours.)

The above case is conspicuous because at no point therein was the case of *Birmingham* v. *Rice* mentioned, and the Judge who wrote the opinion in the *Birmingham* v. *Rice* case did not participate in this opinion. *Birmingham* v. *Rice* was decided by a divided court, four to five, on February 11, 1947. This opinion in the *White* case was rendered on June 17, 1949. It has never been changed, modified or overruled by the courts of Iowa. Therefore, if the law of Iowa is material, which we deny, the lower Courts failed to follow it.

Clearly, if Petitioner had purchased the cattle instead of having sold them, as a federal public utility, and the law of Iowa was controlling, then Petitioner like the purchasers of said cattle from Petitioner, could not be held liable. Certainly Petitioner, acting under compulsion should have the same protection. The lower Courts thus failed to apply the law of Iowa, if applicable.

(B) The lower courts failed or refused to follow the law of Iowa to the effect that where one of two innocent persons must suffer a loss caused by the acts or defalcation of a third person, that he who places the third person in a position to perpetrate the fraud or whose negligence caused the loss must bear and sustain it as the same was announced by the Supreme Court of Iowa in the case of Crescent Chevrolet Company v. Lewis, et al.

In the case of *Crescent Chevrolet Company* v. *Lewis, et al,* 230 Ia. 1074, 300 N.W. 260, a distributor of automobiles had sold and delivered an automobile to a dealer, accepting as payment a worthless check. The dealer, before it became known that the check was worthless, executed a mortgage to the Securities Acceptance Corporation to secure money borrowed from it. The distributor thereafter brought a replevin action naming the estate of the dealer, then deceased, and the Acceptance Corporation as defendants. The Acceptance Corporation was not a purchaser, but a secured creditor. The Supreme Court of Iowa, in speaking through the same justice who wrote the opinion in the *Birmingham* case, Justice Oliver, and in deciding in favor of the Acceptance Corporation because it was an innocent person, on page 262 of 300 N.W., said:

> "*The more recent authorities usually base such holdings upon the doctrine that where the owner of personal property so clothes another with indicia of title as to deceive a bona fide purchaser relying thereon, the purchaser will be protected against the true owner. The rule does not depend upon actual title, but rests upon conduct of the party which precludes him from disputing, as against the innocent acting person, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the third party. Gustafson* v. *Equitable Loan Ass'n,* 186 Minn. 236, 243 N.W. 106. *This is but an application of the broad general principle that when one of two innocent persons must suf-*

fer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss. Under the facts in this case, we conclude the mortgage of Securities Acceptance Corporation is superior to plaintiff's rights." (Emphasis ours)

This old equity maxim is not a maxim invoked for the benefit only of purchasers and secured creditors, it is invoked for all innocent persons who become involved.

In the case of *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Flanders,* 56 Fed. (2d) 114 (involving an Iowa Transaction), the plaintiff, Flanders, a trader and dealer in livestock at Sioux City Stockyards, Sioux City, Iowa, had sold to one representing himself to be Will Buntrock, of Henkin, South Dakota, 35 head of cattle upon which the plaintiff took back a mortgage for the purchase price thereof. The plaintiff, Flanders, went to the expense of ascertaining whether Will Buntrock resided at Henkin, South Dakota, and as to his standing in the community. They were advised that there was a Will Buntrock who was a substantial citizen and owned land in that vicinity.

The plaintiff failed to investigate as to whether the party they were dealing with was the genuine Will Buntrock. The party with whom the plaintiff was dealing was an imposter. When the plaintiff sold the imposter the cattle and took back his purchase mortgage, he delivered an account of sales. The cattle were billed from the plaintiff to the said Will Buntrock at Henkin, South Dakota, under a straight bill of lading. In transit, the imposter diverted the shipment to the stockyards at Sioux Falls, South Dakota, where they were sold for his account, and from the proceeds of which sale he received the benefits. The railroad was sued in conversion.

The court, in speaking through Judge Gardner on Pages 117 and 119 as to whether title had passed to the imposter, on Page 117 said:

> *"The fraud was such as entitled plaintiff to rescind the contract of sale and recover from the imposter the possession of the cattle or their value. The contract, however, was not void, but simply voidable. Though deceived as to the buyer's identity and responsibility, yet the plaintiff sold to this imposter, and title passed to him."* • • • (Citing cases.) (Emphasis ours.)
>
> *"It is to be observed that plaintiff recognized the purchaser's title by taking back from him the chattel mortgage which contained the above-noted recitals, and he placed a copy of this instrument in the hands of the purchaser. He also placed in the hands of the purchaser copy of the account sales, so that the imposter not only had the legal title, but the plaintiff clothed him with the documentary insignia of ownership. Title to the cattle being in the imposter, the railroad company, having no actual knowledge of any fraud, was not only entitled but required to make delivery to him upon his demand, as the real owner of the property. He also had a right to CHANGE OR DIVERT THE SHIPMENT WHILE IN TRANSIT."* • • • (Citing cases.) (Emphasis ours.)

The court, in holding the plaintiff could not recover, on Page 119 said:

> *"In the final analysis, it was plaintiff's mistake as to the identity of the party with whom he was dealing which led to his loss of the cattle. It cannot be said that the railway company made any mistake or that it was negligent in handling the shipment. The maxim that, 'Where one of two innocent persons must suffer by the act of the third, he by whose negligence it happens must be the sufferer,' is well grounded on the principles of natural justice. The swindler perpetrated a fraud upon the plaintiff, and not upon the railway company. This misfortune was one of the hazards of plaintiff's business, and not one of the hazards of the railway company's business."* (Emphasis ours.)

This is the universal law announced and followed by all the States of the Union passing upon the question. We could cite countless numbers of cases announcing the same principle. To prevent the lengthening of this brief we will refrain from doing so.

This point has been inserted in this brief to show:—

1. That if the law of Iowa is material, the lower Courts failed to properly apply it.
2. That the lower Courts by their decisions deprived Petitioner of its property without due process of law in violation of the Federal Constitution.

What could Petitioners have done to have prevented Respondent from having this loss? Respondent did not know the payment would be refused on his check until several days after the Petitioner had received and sold the cattle and accounted to the shipper, Tobias Brackey, as a federal public utility in accordance with the duties imposed upon it by law. Petitioner performed its duties honestly and in good faith.

7.

THE TRUE EFFECT OF THE OPINIONS OF THE LOWER COURTS IN THE CASE AT BAR IS TO UNLAWFULLY BURDEN INTERSTATE COMMERCE, IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The necessity of market agents to make sales at the centralized markets is essential. This Court recognized this fact in the case of *Stafford* v. *Wallace* hereinbefore quoted when this Court speaking through the then Chief Justice Taft said:

> *"The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers.* * * * * *
>
> *"The stockyards and the sales are necessary factors in the middle of this current of commerce."*

Therefore, any rule of law that would impose such a burden upon market agencies by imposing a liability which market agencies cannot advisedly afford to assume, would prevent any one from engaging in the business of a market agency, would impair the flow of livestock through the centralized markets and thus place an unlawful burden on interstate commerce.

It can be said without fear of successful contradiction that the true effect of the lower Courts' decisions is to impose upon all market agencies liabilities as follows:

a) To become the insurers of the title of all livestock which it is under compulsion to receive and sell.

b) To become the guarantors of the character, honesty and integrity of all citizens whom it is thus required to serve.

c) To become the guarantors of the character, honesty and integrity of all citizens to whom either owners of livestock or their agents, or public sales barns, or auctioneers make sales.

d) Compels such national public utilities to assume hazards in the business of those speculating in livestock sales, all hazards inherent in their business and the hazards inherent in the business of financial institutions and others engaged in making loans on livestock.

e) This is necessarily true because at the time Petitioner received and sold the livestock in question and accounted to the shipper, Tobias Brackey for whom they had, for a considerable period of time, been selling livestock, they had no knowledge that the livestock had been sold by Respondent with full knowledge that it was to be shipped to the centralized market immediately for resale.

f) Petitioner had no knowledge that the purchase price of the livestock had been paid by check upon which payment would later be refused. Respondent had no such knowledge at the time Petitioner's services were rendered. Respondent himself did not know that payment would be refused on the check until several days later. He reposed full confidence in Brackey and delivered indicia of title and possession with full knowledge that on the same day the livestock was being shipped to a centralized market for resale.

This rule of law becomes more alarming when considered in the light of the facts that Respondent had been making weekly sales to Brackey and accepting his check in payment drawn on the same bank.

If this burden is placed upon market agencies, federal public utilities, who, with diligence and exercising careful and prudent judgment, could afford to engage in the business of a market agency?

If any one could not engage in the business of a market agency would not this prevent the free flow of livestock through the centralized markets?

Even in this period of almost unprecedented prosperity market agencies are being pressed with both claims and suits in substantial amounts because of previous decisions imposing an impossible burden of liability upon them. If this is true under present conditions, in what condition would market agencies find themselves if and when confronted with another financial depression?

Market agencies must treat all shippers and consignors of livestock alike. They cannot impose upon one shipper a burden that they do not impose upon all shippers.

The hazard as to whether Brackey's check, given to Respondent in payment of the livestock, would be honored was a hazard inherent in Respondent's business—not a hazard inherent in Petitioner's business. This because Respondent delivered indicia of title and possession to Brackey with full knowledge that on the same day the livestock was being shipped to the centralized market at St. Paul for resale.

It has long ago been settled that any act of a branch of the Government itself, or of a state, or of an administrative body, which impedes, obstructs and burdens interstate commerce violates the Commerce Clause of the Federal Constitution.

This court, in the case of *Southern Pacific Company* v. *State of Arizona,* 325 U. S. 761, 89 L. Ed. 1915, in passing upon the validity of a statute of the State of Arizona limiting the number of cars that can be carried on any train passing through the state, speaking through Chief Justice Stone, on pages 773 and 779 of 325 U. S. and 1927 and 1930 of 89 L. Ed., said:

> *"The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service.*
>
> • • • • •
>
> *"Its undoubted effect on the commerce is the regulation without securing uniformity, of the length of trains operated in interstate commerce, whcih lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency."* (Emphasis ours.)

See also:

Morgan v. *Commonwealth of Virginia*, 328 U.S. 373 at 378 and 379; 90 L. Ed. 1317 at 1323;

Webber v. *State of Virginia*, 103 U.S. 344, at 350 and 351; 26 L. Ed. 565, at 567;

State of Minnesota v. *Barber*, 136 U.S. 313, at 319 and 326; 34 L. Ed. 455, at 458 and 460;

Southern Railway Company v. *Reid*, 222 U.S. 424 at 441 and 442; 56 L. Ed. 257, at 262;

Lemke v. *Farmers' Grain Co.*, 258 U.S. 50, at 58 and 59; 66 L. Ed. 458, at 464;

Northern Pacific Ry. Co. v. *Wall*, 241 U.S. 87, at 91; 60 L. Ed. 905, at 907;

Southern Railway Company v. *Prescott*, 240 U.S. 632, at 636, 639, 640 and 641; 60 L. Ed. 836, at 838, 839, 840 and 841.

To cause market agencies to investigate the title of all livestock before selling it would cause an impossible congestion at the stockyards.

To require market agencies to investigate the title of all livestock before remitting the proceeds would cause market agencies to expend more money than they receive for their services, sometimes even more money than the livestock itself is worth or the net proceeds derived therefrom. Such requirements would indeed burden interstate commerce.

We submit that the judgment of the lower Courts destroys one of the purposes for which the Packers and Stockyards Act was enacted namely to make the flow of livestock through the centralized markets free and unobstructed and that the decisions of the lower Courts in truth and in fact improperly and unlawfully burden interstate commerce.

8.

DECISIONS OF THE COURTS IN THE CASES WHERE THE MARKET AGENCY OR PUBLIC UTILITY DEFENSE HAS BEEN RAISED AND INSISTED UPON.

(A) Decisions which have been contrary to this Petitioner's contentions.

The cases which have been contrary to this Petitioner's contentions are as follows:

Mason City Production Credit Ass'n. v. *Sig Ellingson & Co.*, 205 Minn. 537, 286 N.W. 713.

First National Bank of Pipestone v. *Siman, et al.*, 67 S.D. 118, 289 N.W. 416.

Moderie v. *Schmidt*, 6 Wash. (2d) 592, 108 Pac. (2d) 331.

Birmingham v. *Rice*, 238 Iowa 410, 26 N.W. (2d) 39.

Citizens State Bank v. *Farmers Union Livestock Coop. Co.*, 165 Kans. 96, 193 Pac. (2d) 636.

Allen C. Driver, Inc., et al v. *Mills*, (Not officially printed in Maryland Reports), 86 Atl. (2d) 724.

Analyzing these decisions, we find the following:

This Court denied a petition for writ of certiorari in the *Mason City Production Credit Ass'n.* case, the reason for which we know not.

In the case of *First National Bank of Pipestone* v. *Siman, et al., supra*, the South Dakota Court, without any independent consideration or analysis of the question presented, followed the Minnesota courts in the *Mason City Production Credit Ass'n.* case, because this Court had denied a petition for writ of certiorari, as well as a petition for rehearing.

In the case of *Moderie* v. *Schmidt*, the court likewise, without any independent consideration of the question, fol-

lowed the decision of the Minnesota Courts in the *Mason City Production Credit Ass'n.* case, because this Court had denied a writ of certiorari and because the Solicitor General of the United States opposed the granting of the writ.

The case of *Birmingham* v. *Rice* was the first case in which the court considered on the merits this question. The decision in that case was by a divided court of five to four, Justice Smith of that court writing a strong dissenting opinion sustaininng the contention of this Petitioner. This dissenting opinion we believe in line with the law and are, therefore, publishing, reproducing and printing in an appendix Justice Smith's dissenting opinion. The decision of the majority court was criticised by an article appearing in the Iowa Law Review, issue of October, 1947, and permanently in Volume 32, Pages 755 to 760, inclusive, of said Law Review. We are taking the privilege of printing this article in the appendix, which will not lengthen this brief and which this Court can ignore if it is not interested therein. Likewise, the opinion of the majority of the Supreme Court was criticised in the Columbia Law Review, the material part thereof being reproduced here in the appendix.

With reference to the decision of the Supreme Court of Kansas, in the case of *Citizens State Bank* v. *Farmers Union Livestock Coop. Co.,* this decision was likewise rendered by a divided court of three to four, in which Justice Hoch wrote a strong dissenting opinion, which we are likewise reproducing and printing in the appendix to this brief.

The court, in the case of *Driver et al.* v. *Mills,* rendered by the Court of Appeals of Maryland on March 7, 1952, did nothing more than blindly follow the decisions hereinbefore cited.

(B) Cases sustaining Petitioner's contentions on the immunity question.

The decisions sustaining this Petitioner's contentions on the question of immunity are as follows:

Blackwell v. *Laird, et al.,* 236 Mo. App. 1217, 163 S.W. (2d) 91, (decided after the *Mason City Production Credit Ass'n.* case and the *First National Bank of Pipestone* case).

Sullivan Co. v. *Wells,* 89 Fed. Supp. 317, at 320 321, (Nebraska and Iowa transactions).

Montana Meat Co. v. *Missoula Livestock Auction Co.,* 230 Pac. (2d) 955 at 958 and 959, (decided April 27, 1951)

Another direct case sustaining Petitioner's position is the case of *Abernathy* v. *Wheeler,* 92 Ky. 320, 17 S.W. 858. This case, while not involving the Packers and Stockyards Act, involved a Kentucky statute converting the tobacco sales warehouses from the status of private agencies to the status of public utilities.

In the case of *Kent, et al.* v. *Wright,* 198 Okla. 103, 175 Pac. (2d) 802, the Supreme Court of the State of Oklahoma had before it a case where the market agency, or public utlity defense was presented. In that case it decided it was not necessary for it to consider whether any immunity existed in favor of the defendant on account of the compulsory nature of their services, but decided the case upon the theory that plaintiff, having sold the cattle with knowledge that they were being shipped to a public market for sale, passed title and waived any right to claim title thereto.

From the above observations, it will be noted that the great number of these decisions against Petitioner's contention has been caused by the denial of certiorari by this

Court in the case of *Mason City Production Credit Ass'n. v. Sig Ellingson & Co.* We submit that unless this Court takes jurisdiction and decides and sets at rest this question, the recent decision in the case at bar, by the Eighth Circuit Court of Appeals, will so influence courts that it would be useless for this Petitioner, or any other market agency, to further raise the question. It is, therefore, highly important that this Court take jurisdiction and decide this question so that it will no longer be a question in debate but will be determined and settled law and the liability and responsibility of market agencies fixed and determined. If the ultimate liability imposed upon market agencies by this Court be the same as that imposed by the lower Courts, how can any one engaged in the business of a market agency continue therein or any person contemplating to engage therein enter into such business.

9.

THE OPINIONS OF THE LOWER COURTS DENY TO PETITIONER THE EQUAL PROTECTION OF THE LAW GUARANTEED TO IT BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Under the preceding points of this brief, we have definitely pointed out that under the same situation and facts as exist in this case, market agencies in the States of Kentucky, Missouri, Nebraska and Montana would not be liable because of the compulsory nature of their services. We have definitely pointed out how the great array of cases to the contrary has arisen, which certainly are contrary to the Constitution. We have also definitely pointed out how common carriers, operating under the Interstate Commerce Act, similar, if not identical, to the Packers and Stock Yards Act, are entitled to immunities this Petitioner claims on account of the compulsory nature of its

services. We will not in this part of the brief go into repetition. The law is either one way or the other. If Petitioner is a public utility and is not entitled to the same protection as other public utilities serving under compulsion, but little can be said. We have heretofore pointed out how market agencies in different States are subject to competition of market agencies of other States. For those in certain States under identical facts to be immune from liability and for those engaged in business in the State of Minnesota to be subject thereto certainly presents a case where the law should be uniform. Either the law should be uniform or the market agencies engaged in business in the States of Iowa and Minnesota are subject to liability not imposed upon market agencies engaged in the same business in other States. This Court should determine a uniform law applicable to all market agencies.

As the law exists, a different law controls market agencies in the States of Minnesota and Iowa than that controlling the liability of market agencies in the States of Kentucky, Missouri, Nebraska and Montana (many other States not having decided the question.)

The courts of all States grant immunity to common carriers, who act honestly and in good faith, from receiving and transporting mortgaged or stolen property on account of the compulsory nature of their services. We, therefore, submit:

(1) Why should market agencies, all in competition with each other, be subject to different liability under the same facts?

(2) Why should a distinction be made between public utilities engaged as common carriers and those engaged as sale agents, market agencies, federal public utilities, necessary at the centralized markets both engaged in interstate commerce?

We submit that it would take almost a Houdini to give reasons for the difference.

The compulsion market agencies are under, in receiving and selling live stock many miles away from the point of origin, has been heretofore pointed out. The facilities they have for determining title have been heretofore pointed out.

To say that market agencies are not entitled to the same immunities as other public utilities is to speak in language unknown to man. This Court has held under similar circumstances that such a situation deprives litigants of the equal protection of law. We need only to call attention to the following authorities:

Power Manufacturing Company v. *Saunders,* 274 U. S. 490, at 493; 71 L. Ed. 1165, at page 1168.

Louisville Gas & Electric Co. v. *Coleman,* 277 U. S. 32, at pages 37 and 38; 72 L. Ed. 770, at Pages 773 and 774.

Frost v. *Corporation Commission,* 278 U. S. 515, at pages 522 and 523; 73 L. Ed. 483, at pages 488 and 489.

Hartford Steam Boiler Inspection & Ins. Co. v. *Harrison,* 301 U. S. 459, at 463; 81 L. Ed. 1223, at pages 1226 and 1227.

10.

THE JUDGMENT OF THE LOWER COURTS DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Under our statement of the facts and in the previous points of this brief we have pointed out where Petitioner has been denied the same protection that has been guaranteed to those not engaged in the business of a market

agency. Among the facts which we have not pointed out is the fact that under the greater weight of authority, it is held that where a vendor of property sells the same and delivers possession with the intention that title was passing, he has waived any right to claim title, against an innocent third person. Such a vendor has no right to claim the same further in the hands of an innocent purchaser or to hold an innocent third person liable. For such authority we need only cite the following cases:

White v. *Pike,* 240 Ia. 596, 36 N.W. 761.

Kent et al v. *Wright,* 198 Okla. 103, 175 Pac.. (2d) 802, at 804.

Sullivan Co. v. *Wells,* 89 F. Supp. 317, at 319.

Charles Keegan v. *Kaufman Bros.,* (Cal. App.) 156 Pac. (2d) 261, at 264.

Capital Automobile Co. v. *Ward,* 54 Ga. App. 873, 189 S.E. 713 at 714, 715.

Parma v. *First National Bank of Cameron,* (Tex. Civ. App.) 27 S. W. (2d) 274, at 276.

Kemper Grain Co. v. *Harbour,* 89 Kas. 824, 133 Pac. 565, at 568.

Nelson v. *Lewis, et al.,* 143 Kas. 106 at 108-109, 53 Pac. (2d) 813 at 814-815.

We have heretofore pointed out in this brief where the lower courts failed to apply the law of Iowa, as well as the universal law of the Nation, to the effect that where one of the two innocent persons must suffer, he who placed the third party in a position to perpetrate the fraud, or by whose negligence the fraud was perperated, must bear the loss. If in the annals of litigation there ever existed a case where all these principles were applicable, it exists in the case at bar. How can it be said under the undisputed facts in this case and the law of this Nation as we have always known it, that the Petitioner could be held

liable It can only be done by denying to this Petitioner an equal protection of the law. We submit that the decision of the lower courts is unjust, arbitrary, oppressive, unreasonable and confiscatory, and that such action denies to Petitioner due process of law. For authority on this point, we cite the following cases:

Ballard v. *Hunter,* 204 U. S. 241, at 255, 256; 51 L. Ed. 461, at 472.

Hurtado v. *People of California,* 110 U. S. 516, at 530 to 532, incl. 28 L. Ed. 232, at 237.

St. Joseph Stock Yards Co. v. *United States,* 208 U. S. 38, at 51, 52; 80 L. Ed. 1033, at 1041, 1042.

Missouri Pacific Ry Co. v. *Tucker,* 230 U. S. 340, at 348, 349; 57 L. Ed. 1507, at 1509, 1510.

Ex Parte Young, 209 U. S. 123, at 163, 164; 52 L. Ed. 714, at 730, 731.

Wadley Southern Ry. Co. v. *State of Georgia,* 235 U. S. 651, at 662, 663, 59 L. Ed. 405, at 412.

Bluefield Water Works & Improvement Co. v. *Public Service Commission of W. Va.,* 262 U. S. 679, at 690; 67 L. Ed. 1176, at 1181, 1182.

Southern Iowa Electric Co. v. *City of Chariton,* 255 U. S. 539, at 541, 542; 65 L. Ed. 764 at 775.

Norfolk & Western Ry. Co. v. *Conley, Atty. Gen. of the State of W. Va., et al.,* 236 U. S. 605, at 614; 59 L. Ed. 745, at 749. 750.

Railroad Retirement Board v. *Alton R. R. Co.,* 295 U. S. 330, at 337, 79 L. Ed. 1468, at 1480.

Denver Union Stock Yards Co. v. *United States,* 57 Fed. (2d) 735, at 739.

Can it be truthfully said that the lower courts decisions do not deprive this Petitioner of its property without due process of law?

CONCLUSION.

In conclusion we submit that:

1) The liability or non-liability of Petitioner, a market agency, a public utility, operating under a federal act, known as the Packers and Stockyards Act, which having performed its duty honestly and without knowledge of any facts that it should not perform its duties, presents a federal question for the determination of this Court and should not be left to the Courts of the forty-eight states to arrive at different conclusions and opinions.

2) For this Petitioner to be held liable under the undisputed facts in this case is to place a burden upon Petitioner and all other market agencies that would prohibit any one from engaging therein and thus unduly burden interstate commerce.

3) That under the undisputed facts in this case title passed from Respondent to Tobias Brackey, the party to whom Respondent had made the sale in question, Petitioner therefore, having acted honestly and in good faith, could not be held liable to Respondent. To so hold would be in violation of Petitioner's constitutional rights as hereinbefore pointed out.

4) That the decision of the lower Courts denies to Petitioner, as well as all others engaged or contemplating being engaged in the business of a market agency, their constitutional rights as hereinbefore pointed out in this petition and supporting brief.

5) That if this decision is permitted to stand no one could well afford to engage in the business of a market agency, which would destroy the sale of livestock through the centralized markets, a necessary element in the free flow of livestock through the centralized markets.

6) That all market agencies now engaged in such a business, and all contemplating to engage therein, should

be fully informed by this Court's decision as to their liability and non-liability so that they can decide for themselves whether any one can engage in such business.

7) The rule announced by the lower Courts announces a rule that no one can afford to engage in the market agency business, whether now engaged or contemplating to so engage.

8) That a Writ of Certiorari should be allowed as prayed, this case reviewed on its merits, a permanent law laid down by this Court so that no one in the future will be speculating on guess, speculation and conjecture but should be fully informed as to the law by a decision of this Court which would be uniform and controlling throughout the Nation.

9) A refusal of this petition for certiorari would refuse to this Petitioner its constitutional rights as hereinbefore set out. After all, market agencies are entitled to the same federal protection that all other public utilities are entitled to, especially when acting honestly and in good faith. Why should they be denied these rights?

10) We agree with this Court that there is time to speak and time not to speak, but we believe that the time to speak is now present. If we are wrong, it is a humble wrong, but we still believe this Court should now speak.

Respectfully submitted,

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APPENDIX.

Dissenting opinion of Justice Smith written on behalf of the four dissenting judges in the case of *Birmingham* v. *Rice Bros.*, 238 Iowa 410, at Pages 422 to 429, inclusive, 26 N.W. (2d) 39, at Pages 46 to 49, inclusive:

"SMITH, Justice (dissenting).

"Being unable to agree with the conclusion reached in division II of the majority opinion I shall state as briefly as may be the ground of my dissent. The question becomes more important as the business of packing and stockyards and allied industries becomes more and more complex and vital to the life and welfare of society.

"The common law rule of agents' and factors' liability (discussed in division I of the majority opinion) has become a harsh one as the relationship has of necessity become more impersonal. So long however as the agent is free to determine whom he will represent and what means he will employ to reach such determination the rule is not unjust that makes him liable for the consequences in case he assists, even unknowingly, in the perpetration of a wrong by his principal upon a third person.

"The so-called Packers and Stockyards Act has, I believe, changed the character of the relationship between those stockyards and market agencies that come within its provisions and their patrons or customers.

"The Act makes it the *duty* of every 'stockyard owner' and 'market agency' 'to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *.' Title 7 U.S.C.A. Ch. 9, Sec.

205, Aug. 15, 1921, c. 64 Sec. 304, 42 Stat. 164. They are required to register with the Secretary of Agriculture who may require reasonable bonds from every 'market agency' 'to secure the performance of their obligations.' It is required that their rates or charges shall 'be just, reasonable and nondiscriminatory' and schedules of such rates must be filed with the Secretary, printed and kept open to public inspection at the stockyards and the Secretary may hold hearings thereon. Title 7 U.S.C.A. Ch. 9, Secs. 204, 206, 207.

"The Act also provides: 'It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyards services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.' Title 7 U.S.C.A. Ch. 9, Sec. 208. The term 'stockyard services' includes 'buying or selling on a commission basis.' Id. Sec. 201. And: 'It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * buying or selling on a commission basis * * *.' Id. Sec. 213. There are also provisions for punishing violations of the Act and orders of the Secretary of Agriculture thereunder.

"What are the purposes of the Act? In *Stafford* v. *Wallace*, 258 U.S. 495, 42 S.Ct. 397, 401, 66 L. Ed. 735, 23 A.L.R. 229, it is said the purpose of the Act is 'to regulate the business of the packers done in interstate commerce,' and to forbid 'them to engage in unfair, discriminatory, or deceptive practices * * *, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business.'

"But it is also said in that case: 'The object to be secured * * * is the free and unburdened flow of livestock * * * through the great stockyards and slaughtering centers * * * in the form of meat products in the consuming cities of the country * * * or, still, as livestock, to the feeding places and fattening farms * * * for further preparation for the market.'

"So much for the *purposes* of the Act. How does it propose to accomplish such purpose? The opinion proceeds:

" 'The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to consumers in the East. *It assumes that they conduct a business affected by a public use* of a national character and subject to national regulation.' (Italics supplied.)

"And what is the effect upon the relationship of these agencies to those they serve? The Supreme Court in effect says the Act requires the adoption of the 'conduit' theory: '*The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current * * * the commission men are essential in making the sales, without which the flow of the current would be obstructed * * *.*' (Italics supplied.)

"This conclusion is reached and announced as justification for government regulation in the interest of the consuming public which is dependent upon the industry. But if sound its implications should not be rejected when invoked by the utility that is made subject to the regulation. The Act should not be interpreted in one way for one purpose and in a different way for another. The agencies should not be held to be converted by the Act into public utilities, re-

quired to serve without discrimination and still held to personal responsibility for the honesty and good faith of the customers they are required to serve.

"Other cases recognizing that the Act does change the status of these agencies from that of ordinary factors to that of public utilities are not wanting: *Tagg Bros. & Moorhead* v. *United States, D. C.*, 29 F. 2d 750, affirmed, 280 U.S. 420, 50 S.Ct. 220, 74 L. Ed. 524; *Farmers' Livestock Commission Co.* v. *United States, D.C.*, 54 F. 2d 375; *Nashville Union Stockyards, Inc.* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015; *Blackwell* v. *Laird*, 236 Mo. App. 1217, 163 S.W. 2d 91.

"It is true the primary purpose of the Act is to prevent conspiracies to obstruct commerce that would tend to the formation of monopolies. It attempts to do this by making of the instrumentalities public utilities and enacting rules for their regulation. They are required, in accepting requests for service, 'to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices,' applicable to all alike. These practices must be followed even though their nonobservance in an individual case may constitute no threat of monopoly.

"What reasonable regulation or practice would enable the utility to protect itself in a case of this kind? It may not exact from one customer a showing as to title or right that it does not exact from all others. Otherwise, it would risk incurring liability to the prospective customer against whom it thus discriminated.

"It is obvious any general rule or practice of requiring everyone to show title or right of disposition of property offered for sale would impede and obstruct the flow which the Act seeks to make free and unburdened. Of course if there were suspicious cir-

cumstances in a given case sufficient to put the agency on inquiry a different situation would be presented. But in the absence (as here) of any ground for suspicion it is difficult to see how any general rule of practice could enable the agency to protect itself or the real owner of the property without slowing down and obstructing the very processes the Act is designed to make free and unobstructed.

"Perfect analogies are never available but common carriers and public warehousemen are fair examples of utilities that are not subject to the rule of liability imposed upon ordinary agents. The common carrier is uniformly held free from liability to the true owner of goods if without notice of such ownership it receives and delivers such goods upon request of an unauthorized consignor with apparent right of possession and control. 9 Am. Jur. Carriers Secs. 323, 552; 10 C.J. 274; 13 C.J.S., Carriers, Sec. 172, subsec. e, page 340.

The same immunity is conceded to the public warehouseman who without notice of the rights of the true owner sells stored goods upon direction of an unauthorized bailor. 67 C.J. 537; 27 R.C.L. 1000, 1001.

"It is true the common carrier does not undertake to deal with or in any way affect the title of the property trasported. But it may and frequently does make impossible the recapture by the rightful owner of the possession of which he has been wrongfully deprived.

"The textual statement as to public warehousemen above credited to Corpus Juris and Ruling Case Law is based upon *Abernathy* v. *Wheeler*, 92 Ky. 320, 17 S.W. 858, 36 Am. St. Rep. 593. This case is sometimes assumed to represent a 'minority view' as to the liability of factors and agents generally for conversion.

"I do not so regard it. The case involved a public tobacco warehouse—not an ordinary agent or bailee but a public utility. 67 C.J. 444, Warehousemen and Safe Depositaries, Sec. 4B; *Gray* v. *Central Warehouse Co.*, 181 N.C. 166, 106 S.E. 657; *Nash* v. *Page*, 80 Ky. 539, 44 Am. Rep. 490. The *Abernathy* case presents, not a 'minority view' of the liability of ordinary agents and factors, but a well reasoned statement of the exception to the general rule of liability in the case of a factor that has become a public utility.

"Four state appellate courts have had occasion to consider cases similar in principle to the instant case arising under the Packers and Stockyards Act. The earliest, *Mason City Production Credit Ass'n* v. *Sig. Ellingson & Co.*, 1939, 205 Minn. 537, 286 N.W. 713, involved the rights of a mortgagee under a recorded mortgage. While it is authority for the holding of the majority here it does attach importance to the fact that plaintiff's mortgage was recorded and that the fact of recording constituted constructive notice to defendant: 'The courts of the states of Iowa and Minnesota have for such a long time, on the principle of comity, enforced rights of holders of chattel mortgages validly made and filed in either state * * *.' 286 N.W. at page 717.

"The South Dakota and Washington cases (*First Nat. Bank* v. *Siman*, 67 S.D. 118, 289 N.W. 416; and *Moderie* v. *Schmidt*, 6 Wash. 2d 592, 108 P. 2d 331) were decided the following year and follow the decision in the *Minnesota* case without independent or original discussion. The *Washington* case mistakenly says that in the *Minnesota* case the solicitor general of the United States appeared in the United States Supreme Court and opposed the granting of a writ of certiorari by that court. That this is not strictly

accurate, see 308 U.S. 599, 60 S.Ct. 130, 84 L.Ed. 501. It is true his name appears in resistance to a petition for rehearing. 308 U.S. 637, 60 S.Ct. 178, 84 L.Ed. 529. Denial of a writ of certiorari by the Supreme Court imports no expression of opinion by that court as to the merits of the case. *House* v. *Mayo,* 324 U.S. 42, 65 S.Ct. 517, 89 L.Ed. 739; *McCrea* v. *Jackson,* 6 Cir., 148 F.2d 193, 197; 36 C.J.S., Federal Courts, Sec. 277, page 182.

In *Blakwell* v. *Laird,* 236 Mo. App. 1217, 163 S.W. 2d 91, decided in 1942, the Missouri Kansas City Court of Appeals held that a market agency under the Packers and Stockyards Act was not liable for accepting and selling stolen cattle on commission since it did not know they were stolen and was not negligent. The holding is based squarely on the proposition that the agency was bound as a public utility to render the service upon reasonable request.

"I shall not quote at length from the opinion. It refers to the *Sig Ellingson* (*Minnesota*) case but declines to follow it: 'We prefer to follow the line of decisions which hold in effect that a public utility which is required by law to render specific services to the public without discrimination, should not be considered in the same category with those who may or may not transport, store, or sell property at the request of one in possession thereof.' 163 S.W. 2d at page 94.

"And in this connection it is pertinent to re-quote language which the *Blackwell* v. *Laird* case quotes from *Nanson* v. *Jacob,* 93 Mo. 331, 6 S.W. 246, 249, 3 Am. St. Rep. 531: 'Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in

the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion.'

"The majority opinion here says: 'Certainly, Congress did not adopt the Packers and Stockyards Act to encourage and protect the operation of fences for handling property stolen or procured by fraud.' Certainly not. Nor are railroads operated to enable dishonest persons to make way with stolen or fraudulently obtained goods. And if this were a case where the market agency had knowledge (or should in the exercise of reasonable care have obtained knowledge) that 'Brainman' was not Brainman and that his check (given in payment for the cattle) would 'bounce', I would agree that it would have been its duty to refuse his request for service.

"The contrary is true. There was nothing to suggest that the request was not reasonable, no reason, so far as the record shows, to sugget that the request be denied. Had appellee refused to accept the goods it would have done so at the risk of liability for resultant damage.

"Neither the majority opinion nor appellant's briefs have suggested what appellee should have done, or what practice it should follow in accepting or refusing employment, that would have protected both itself and appellant.

"I would, for the reasons set out, affirm the decision of the trial court.

"WENNERSTRUM, C. J. and HALE and MANTZ, JJ., join in this dissent."

Dissenting opinion of Justice Hoch, written in behalf of the three dissenting judges in the case of *Citizens State Bank of Dalhart* v. *Farmers Union Livestock Coop. Co.*, 165 Kan. 96, at pages 109 to 116, inclusive, 193 Pac. (2d) 636, at pages 644 to 649, inclusive, rendered May 8, 1948:

"HOCH, Justice (dissenting).

"Time presently available permits only a sketchy and incomplete statement of the reasons which impel me to dissent from this decision. The appeal being here from an order overruling plaintiff's demurrer to certain portions of the answer, and upon stipulation as to the issues thus raised, the essential facts are not in dispute.

"Jones, a resident of Dallam County, Texas, gave a mortgage on cattle to a Dalhart, Texas bank, the appellant here. The cattle were not then in Kansas, but subsequently were brought to Meade County, Kansas, branded, and the mortgage was there recorded on August 4, 1945. In October, 1945, the cattle were shipped by Jones to the Union Stock Yards at Wichita, consigned to the appellee for sale. The Wichita stockyards is regulated under the Packers and Stockyards Act, hereinafter referred to as the Act. The appellee is a market agency registered with and licensed by the Secretary of Agriculture to operate on the Wichita stockyards in the buying and selling of livestock on commission, pursuant to the terms and conditions of the Act. The cattle were received by the market agency, sold, and the net proceeds promptly forwarded to Jones, the shipper and consignor. The market agency had no notice or knowledge of the mortgage. It had no notice or knowledge that the plaintiff or anyone else other than the shipper and consignor had any interest in the livestock. Under